Office-Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

84-1814

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

QUENTIN MEADOWS,

Petitioner,

– against –

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SPIROS A. TSIMBINOS
Attorney for Petitioner
Office & P.O. Address
119 Mowbray Drive
Kew Gardens, New York 11415
(718) 849-3599

39pp

QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioner's Constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution violated by the admission at trial of testimony regarding a lineup identification which occurred in the absence of counsel more than four months after the Petitioner was indicted on the case and after counsel had been retained and had appeared in the matter.

2. Were the Petitioner's Constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution violated when the Prosecution was allowed to impeach the Petitioner's testimony through the use of an alleged admission which was obtained in violation of his right to

counsel.

LIST OF PARTIES

The parties to the instant proceeding are Quentin Meadows, Petitioner and the People of the State of New York as Respondent.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	2
Jurisdictional Grounds	3
Constitutional Provisions	3
Statement of the Case	4
Argument	7
Conclusion	20
APPENDIX A - Relevant Portions of Decision of Honorable Raymond Harrington, County Court, Nassau County, Regarding Motion to Suppress Held on November 20, 1981	1a
APPENDIX B - Order of the Appellate Division, Second Department, of the Supreme Court of the State of New York, June 4, 1984	7a
APPENDIX C - Decision of the Court of Appeals of the State of New York, March 21, 1985	9a

TABLE OF AUTHORITIES

CASES CITED

	Page
Chapman v. California, 386 US 18 (1967)	12
Gilbert v. California, 388 US 263(1968)	7,8
Harris v. New York 401 US 222 (1971)	14,15
Johnson v. Zerbst 304 US 458 (1938)	10
Kirby v. Illinois 406 US 82 (1972)	8
Oregon v. Hass 420 US 714 (1975)	14,15
People v. Maerling 64 NY2d 134 (1984)	15
People v. Riccio 56 NY2d 320 (1982)	15
People v. Samuels 49 NY2d 218 (1980)	14
United States v. Brown 699 F2d 585 (2nd Cir., 1983)	16
United States v. Wade 388 US 218 (1968)	7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO.

QUENTIN MEADOWS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

To the Honorable The Chief Justice, and
Associate Justices of the Supreme
Court of the United States:

OPINIONS BELOW

The opinion of the original trial judge denying Petitioner's motion to suppress the lineup identification and allowing the Petitioner to be impeached by the use of his alleged admission taken in violation of his right to counsel was not officially reported but is reproduced herein, in Appendix A.

The Order of the Appellate Division, Second Department affirming the rulings of the trial judge has been officially reported in 102 AD2d 1016 (2nd Dept., 1984). A copy of said Order is reproduced in Appendix B.

The decision of the New York Court of Appeals affirming the Order of the Appellate Division has not yet been officially reported, but is reproduced herein in Appendix C.

JURISDICTIONAL GROUNDS

The Order of the New York Court of Appeals affirming the Petitioner's conviction was entered on March 21, 1985. The Petitioner is therefore timely filing this application for a Writ of Certiorari pursuant to Rule 20 of the United States Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The petitioner, Quentin Meadows, was convicted in the County Court of Nassau County, State of New York, on March 5, 1982 of two counts of Robbery in the First Degree under Indictment No. 51633/80. The petitioner was accused of robbing the same gas station on two occasions, to wit, October 21, 1980 and October 29, 1980. He was sentenced to a term of from ten to twenty years.

The People's evidence consisted of three identification witnesses with respect to the robbery of October 21, 1980 and two identification witnesses with respect to the incident of October 29, 1980. During the trial the court allowed testimony of a lineup identification of the petitioner by the witness Vincent Rizzuto with respect to the robbery of October 29, 1980. The trial

court also allowed the prosecution to impeach the petitioner's testimony during cross-examination as well as through the testimony of a rebuttal witness, Detective Howell, through the use of an alleged admission made by the petitioner regarding his guilt. The petitioner had moved prior to trial through a suppression motion, to suppress the lineup identification as well as the alleged admission. The trial court had denied the motion to suppress the lineup identification and had also ruled that although the admission could not be used on direct since it was taken in violation of the petitioner's right to counsel, it could be used by the People for impeachment purposes if the petitioner testified at the trial (see Appendix A). Defense counsel, during the trial, objected to the use of this alleged admission during the cross-examination of the petitioner as

well as the rebuttal testimony of Detective Howell.

These issues were raised in the Appellate Division but that court affirmed the rulings of the trial court without opinion (see Appendix B). These issues were again raised in the New York Court of Appeals. That court ruled that the admission of the lineup testimony constituted harmless error and that the use of the alleged admission for impeachment purposes was in accordance with State law.

ARGUMENT

The petition for a Writ of Certiorari should be granted for the following two reasons:

(a) The Lineup Viewing by Vincent Rizzuto Was Conducted In The Absence of Counsel.

This Court has repeatedly held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution and that police who conduct such a lineup in the absence of counsel deny the accused his Sixth and Fourteenth Amendment rights. Such action calls into question the admissibility at trial of the lineup identifications as well as the in-court identifications of the accused by witnesses who attended the lineup (see United States v Wade, 388 US 218 [1968]; Gilbert v California, 388 US 263 [1968];

Kirby v Illinois, 406 US 82 [1972]).

In Gilbert v California, supra at p 273, the Court specifically stated:

> "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of counsel at the critical lineup."

In the case at bar the petitioner was arrested on November 20,1980. An indictment was thereafter filed on January 26, 1981. At the petitioner's arraignment on the indictment held on March 25, 1981 he was represented by retained counsel, James Horan, Esq., who appeared on his behalf. A date was thereafter set for motions and a conference date on the matter was set for May 25, 1981. After indictment and while the petitioner was represented by Mr. Horan, a lineup involving the petitioner was conducted on May 19, 1981 pursuant

to a court order which expired on May 30, 1981. The petitioner's counsel was not present at the time of the line-up. Thus, the lineup in question took place more than six months after the incident and several months after the arraignment. There were no exigent circumstances which made it necessary to proceed in the manner which occurred. At no time did the petitioner waive his right to counsel at the lineup. Rather, it appears that Mr. Horan failed to respond to requests to appear at the lineup. The trial court attributed Mr. Horan's lack of appearance to a lack of diligence in pursuing the matter and in effect held that the petitioner's right was waived by the failure of his attorney to appear (see Appendix A).

The trial court in its rulings was clearly incorrect in that it failed to recognize that there is a strong

presumption against a waiver of fundamental constitutional rights and the fact that the right of waiver was a personal right of the defendant. This Court has always emphasized that a waiver of a constitutional right must be competent, intelligent and voluntary and that a right too easily waived is no right at all (see Johnson v Zerbst, 304 US 458 [1938]).

In the case at bar, defense counsel strongly emphasized the issue of lack of counsel at the lineup and specifically urged the court:

> "I say also we have established that no counsel was present even though at that time Mr. Meadows was represented by an attorney, a Mr. Horan. Again, I will be candid with the Court, what transpired then I have no knowledge. But I say this. I don't think Mr. Meadows should be punished for what his attorney or any attorney neglected to do.
>
> I think the purpose in

> having an attorney there is to protect his rights and to see that at the time and place it is fairly conducted.
>
> Mr. Meadows was deprived of that through no fault of his own. There could have been a remedy, there could have been another attorney assigned by the court."

Thus, by granting the instant petition this Court has the unique opportunity to determine the important issue of whether a defendant can be denied his constitutional right of counsel by the failure of counsel to appear at a lineup after having been notified and requested to do so.

Without specifically discussing this issue, the New York Court of Appeals found that the error which occurred was harmless. In so doing, however, the Court relied heavily upon the admission allegedly made by the petitioner and utilized by the prosecution for impeachment purposes. The Court thus reached a

harmless error determination by considering evidence which the petitioner claims was improperly considered and which is the second ground of the instant petition.

In addition, it must be noted that in order for the harmless error doctrine to apply when violation of constitutional rights are involved, the error must be harmless beyond a reasonable doubt (Chapman v. California, 386 US 18 [1967]). In the case at bar, with respect to the October 29th incident, only one other witness in addition to Rizzuto was able to make an in-court identification. Also, the various witnesses had given height descriptions of the perpetrator to the police which varied by several inches from the actual height of the petitioner.

Thus, in the instant matter, instead

of having a harmless error situation the petitioner was severely prejudiced by the admission of the lineup testimony since such testimony bolstered Rizzuto's credibility as to his in-court identification, and the prosecutor repeatedly stressed Rizzuto's lineup identification to the jury raising it on two occassions in his questioning of Rizzuto and in his summation.

Thus, this Court should determine the important issue presented herein on the merits since a harmless error determination is not warranted.

(b) The Petitioner Was Improperly Impeached By The Use of An Alleged Admission Taken In Violation of His Right to Counsel.

In the case at bar, Detective Howell, who arrested the petitioner,

alleged that Mr. Meadows, in the absence of counsel, admitted to him that he had committed the robberies in question. Because the petitioner had other pending cases in New York State wherein he was represented by counsel, both the prosecutor and the trial court, relying on New York law (see People v Samuels, 49 NY2d 218 [1980]) conceded that the alleged statement was inadmissible on the People's direct case. The trial court, however, ruled that if the petitioner testified the admission could be used on cross-examination pursuant to this Court's decisions in Harris v New York, 401 US 222 (1971) and Oregon v Hass, 420 US 714 (1975).

Thus, after the petitioner testified at the trial the prosecutor asked him on cross-examination:

> "Isn't it a fact Mr. Meadows that when you were arrested you told Detective Howell

> that you stole the money
> from the gas station."

Further, the prosecutor later called Detective Howell as a rebuttal witness who testified that the Petitioner had made such a statement to him. Defense counsel objected to this line of inquiry and argued strenuously that this type of cross-examination and rebuttal testimony was improper.

The courts in New York State, relying upon this Court's decisions in Harris v New York, supra, and Oregon v Hass, supra, have extended the rulings of those cases to permit the use for impeachment purposes, not only of statements obtained in violation of a defendant's Miranda rights but also of those obtained in violation of right to counsel (see People v Riccio, 56 NY2d 320 [1982] and People v Maerling, 64 NY2d 134 [1984]). The rulings of the New York

courts are directly contrary to the position of the Federal Court of Appeals for the Second Circuit which includes within its jurisdictional confines the State of New York. Thus, in United States v Brown, 699 F2d 585 (Second Cir., 1983), the Second Circuit, in reviewing this Court's pronouncements, specifically stated at pages 588 and 589:

> "The government all but concedes that the taking of Brown's post-indictment statement without a valid waiver of his right to counsel violated his Sixth Amendment rights under United States v. Mohabir, 624 F.2d 1140, 1151 (2nd Cir., 1980), which was not handed down until after the statement was obtained. The prosecutor did not use the statement in the government's case-in-chief. The government contends, however, that Brown's statement was properly admitted for impeachment purposes under Harris v. New York, (401 US 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), to show that Brown had perjured himself during his direct examination.
>
> . . .
>
> The government argues that since a

statement taken from a suspect in violation of the strictures of Miranda v Arizona is admissible for impeachment if its 'trustworthiness . . . satisfies legal standards,' see Harris v New York, 401 U.S. at 224, 91 S.Ct. at 645; Oregon v Hass, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221, 43 L.Ed. 2d 570 (1975), a statement taken in violation of a suspect's Sixth Amendment rights should be treated in the same fashion. This argument is rendered untenable by the Supreme Court's decision in New Jersey v Portash, 440 US 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979), which the government ignores, and our decision in Mohabir, supra.

In Portash the Court held that where the use of a defendant's prior statement (in that case immunized grand jury testimony) would be a clear violation of his Fifth Amendment rights, such testimony could not be used even for impeachment purposes. Id. at 459, 99 S.Ct. at 1297. See also Mincey v Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed. 2d 290 (1978) (involuntary confession may not be used to impeach credibility). Faced in Portash with the same argument as that advanced here by the government, i.e., that the Court should follow its earlier rule enunciated in Harris and Hass, the Court held that although a statement taken in violation of a

suspect's Miranda rights could be used for impeachment purposes a statement taken in violation of a defendant's constitutional rights could not be so used. It reasoned that, while Miranda rights could be balanced against the need to deter perjury, when dealing with 'the constitutional privilege . . . [b]alancing . . . is . . . impermissible.' 440 U.S. at 459, 99 S.Ct. at 1297.

Here, too, we deal with an equally clear violation of a constitutional right, the Sixth Amendment right to counsel. Balancing this constitutional protection, therefore, is similarly 'impermissible'. Indeed, in Mohabir we held that even though the defendant, before giving a statement to the prosecutor after the filing of an indictment, had been warned of his Fifth Amendment and Miranda rights, this did not qualify as a waiver of his Sixth Amendment right to counsel because waivers of such rights 'must be measured by a 'higher standard than are waivers of Fifth Amendment rights,' 624 F.2d at 1146 (quoting from Judge Friendly's dissent in Massimo, supra). A fortiori the admission of the statement obtained by Agent Shea in violation of Brown's Sixth Amendment right to counsel was clear error.

. . . Under these circumstances, we cannot say that the error in

> admitting his uncounseled post-indictment statement was harmless beyond a reasonable doubt, which is the stringent standard applied when violations of constitutional rights occur. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Sales v. Harris, supra, 675 F.2d at 541; Klein v. Harris, 667 F.2d 274, 289-91 (2d Cir. 1981)."

Thus, because of the sharp division of opinion between the State Courts of New York and the Federal Second Circuit Court of Appeals this Court should grant the instant petition so as to finally determine and resolve the issue on this important matter.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

SPIROS A. TSIMBINOS
Attorney for Petitioner
Office & P.O. Address
119 Mowbray Drive
Kew Gardens, N.Y. 11415
Telephone:(718)849-3599

APPENDIX

APPENDIX A -

RELEVANT PORTIONS OF DECISION OF HONORABLE RAYMOND HARRINGTON, COUNTY COURT, NASSAU COUNTY, REGARDING MOTION TO SUPPRESS HELD ON NOVEMBER 20, 1981

Ind. No. 51633 of 1980

COUNTY COURT, NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

QUENTIN MEADOWS,

Defendant.

... After hearing the Court will first determine, since it was not addressed by counsel -- lest the Court overlook it, that the statements allegedly made by the Defendant Meadows, although the same cannot be used or introduced by the People on their direct case under People against Samuels; they will be permitted to use the same in the event the defendant testifies under the so-

called Harris case.

The Court concludes that based upon the testimony adduced at this earing, there was absolutely no evidence indeed not even a suggestion, that there was any traditional force, coercion, intimidation or otherwise which induced the statements allegedly made by the Defendant Meadows.

Concerning the identification procedures... I think it worthy of note also that there has been some suggestion made that the Defendant had been denied his right to counsel in connection with the so-called lineup. Actually the only testimony we have had during the hearing is that Detective Bartlett on a couple of occassions called a Mr. Horan's office to advise him of the date, time and place of the lineup, and did in fact leave that information at his office.

I think it is worthy of note that there did appear in this court upon the Defendant's arraignment a Mr. Horan who filed a notice of appearance for the Defendant. Mr. Horan has never again actually appeared in this court in connection with his representation at any time of this Defendant. At the time of his arraignment Mr. Horan was given a substantial period of time at his request for the purpose of making motions, which have to this date never been made, some eight or nine months later... the Defendant having been arraigned on March 25, 1981, some eight months later...

...Again the Defendant had been arraigned before this Court on March 25, 1981, a substantial adjournment was given to James Horan at his request for the purpose of making motions and otherwise proceeding with the case preparing it

for trial. And indeed the Court gave him a two month adjournment to May 25, again to this very date there have been no motions made in this case.

The Court has never had the pleasure of having Mr. Horan appear in this court, again for conference or otherwise, although my chambers have tried to have him here on many, many, many occassions.

The application for the order of this Court was made by motion. That motion has been adjourned not having been answered and there being no appearance by counsel in connection with the motion. And finally the motion granted and an order executed by this Court directing that the lineup take place. Again I am led to believe that that order, a copy thereof was sent to the attorney of record at that time, Mr. James Horan.

And it is worthy of observation that Mr. Horan has not appeared during the course of this hearing to offer any testimony indicating that he did not have any notice of the proposed lineup or sought any adjournment of the same.

I think it further worthy of note that Mr. Horan filed his notice of appearance as a retained counsel, and it is quite obvious to this Court that Counsel cannot ignore his obligation to the Defendant and thereby frustrate every effort to have this matter proceed in an orderly fashion. To find otherwise would give counsel license to merely ignore motions, directives of this Court and have it all inure to the benefit of his client. That obviously cannot be sanctioned and it is not sanctioned.

Based on all of the foregoing the Defendant's oral motion to suppress

the in-court identification or the line-up identification is in all respects denied. And all of the foregoing will constitute my conclusions of law and determinations of fact in connection with this matter and this oral motion.

APPENDIX B -

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, JUNE 4, 1984.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on June 4, 1984.

HON. VITO J. TITONE, Justice Presiding
HON. GUY J. MANGANO,
HON. WILLIAM C. THOMPSON,
HON. RICHARD A. BROWN.

Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

QUENTIN MEADOWS,

Appellant.

In the above entitled action, the above named Quentin Meadows, defendant in this action, having appealed to this court from a judgment of the County Court,

Nassau County, rendered March 5, 1982; and the said appeal having been argued by Spiros A. Tsimbinos, Esq., of counsel for the appellant, and argued by Denise Parillo, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof (affirmed, no opinion) it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Irving N. Selkin

Clerk of the
Appellate Division.

APPENDIX C -

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, MARCH 21, 1985.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

v.

QUENTIN MEADOWS,

Appellant.

The order of the Appellate Division should be affirmed.

On October 21, 1980, a man entered a gas station and robbed an attendant, John Taylor, and his cousin, James Alviti. At police headquarters the next day, Taylor and Alviti identified defendant from a group of slides and photographs. A week later, the same man appeared at the station and robbed Taylor and his co-worker, Vincent Rizzuto. After the

robbery, Taylor informed police that he recognized defendant as the perpetrator and both he and Rizzuto identified defendant from a photographic array. Defendant was arrested pursuant to a warrant on November 7, 1980, and, upon his arrival at the precinct, confessed to both robberies. On May 19, 1981, after the indictment, defendant was placed in a lineup and identified by Rizzuto. The other victims did not view the lineup. Defendant's attorney, James Horan, although notified that the line-up would take place, did not attend, leaving defendant unrepresented. On the motion to suppress the identifications, the court found that the photo arrays and the lineup were not unduly suggestive and that each of the three victims had an independent source for in-court identifications, based on their

observations during the robberies. The court also concluded that defendant was not denied his right to counsel at the lineup because of counsel's refusal to attend. Defendant was convicted after trial, and the Appellate Division affirmed without opinion.

Defendant challenges principally the introduction into evidence of Rizzuto's lineup identification which, he argues, violated his right to counsel (see, e.g., People v. Settles, 46 NY2d 154). We need not pass on this issue because the error, if any, was harmless. There is no cause to disturb the conclusion of the courts below that the identifications of Taylor and Alviti were untainted by any improper procedure. As to Rizzuto, the record supports the hearing court's finding, affirmed by the Appellate Division, that his in-court

identification was based on observation of defendant during the crime rather than at the lineup. In the face of three in-court identifications by eye-witnesses, the evidence of Rizzuto's lineup identification added little to the already overwhelming evidence of guilt. While defendant testified that he did not commit the robberies, this testimony was thoroughly discredited by his confession, which was properly used for impeachment purposes (People v. Maerling, 64 NY2d 134 [decided December 27, 1984]; People v. Ricco, 56 NY2d 320) even though inadmissible on the People's direct case (People v. Samuels, 49 NY2d 218). In these circumstances, any error in the admission of the lineup evidence would not require reversal (see People v. Adams, 53 NY2d 241, 252).

Defendant's remaining contentions

are without merit.

* *

Order affirmed in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur.

Decided March 21, 1985

No. 84-1814

Office - Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

QUENTIN MEADOWS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

DENIS DILLON
District Attorney, Nassau County
Attorney for Respondent
262 Old Country Road
Mineola, New York 11501
(516) 535-3800

BRUCE E. WHITNEY
DENISE PARILLO
Assistant District Attorneys
Of Counsel

2295
Lutz Appellate Printers, Inc.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Do the Sixth and Fourteenth Amendments of the United States Constitution demand reversal of two convictions for two jointly-tried robberies where evidence of a lineup identification made by one victim of one robbery was admitted at trial, the lineup having been fair and unsuggestive, and there having been an adequate independent basis for the identification, where identifications were made by two other victims of the two robberies, one of whom was a victim of both crimes, and neither of whom was present at the lineup, because the petitioner's counsel, who was notified of the court-ordered, post-indictment lineup, was not present for the lineup?

2. Do the Sixth and Fourteenth Amendments of the United States Constitution prohibit the use of post-arrest statements, made following the administration of *Miranda* warnings, but obtained in violation of the New York State laws governing the right to counsel, for impeachment purposes at trial?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Statement of Opinions Below and Jurisdiction 1

Constitutional Provisions 2

Statement of the Case 2

Argument:

The Petition for a Writ of Certiorari should be denied 5

A. The Admission of Testimony Concerning One Victim's Identification of the Petitioner at a Lineup Conducted in the Absence of Counsel Did Not Violate Any of the Petitioner's Constitutional Rights 5

B. The Petitioner's Statement, Although Obtained in Violation of His State Right to Counsel, was Admissible at Trial for Impeachment Purposes 7

Conclusion 9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Chapman v. California, 386 U.S. 18 (1967) 7

Elder v. United States, ____ U.S. ____, 105 S. Ct. 915 (1985). 9

Harris v. New York, 401 U.S. 222 (1971) 8, 9

Jenkins v. State, 167 Ga. App. 840, 308 S.E. 2d 14 (1983) 6

Kirby v. Illinois, 406 U.S. 682 (1972) 8

Mincey v. Arizona, 437 U.S. 385 (1978) 8

New Jersey v. Portash, 440 U.S. 450 (1979) 8

Oregon v. Hass, 420 U.S. 714 (1975) 8

People v. Meadows, 64 N.Y. 2d 956 (1985).....3, 4, 6, 8

People v. Samuels, 49 N.Y. 2d 218 (1980).....7, 8

People v. Styles, 90 Misc. 2d 861 (S. Ct. N.Y. Cty. 1977), aff'd, 71 A.D. 2d 1066 (1st Dept. 1979)..... 6

United States v. Brown, 699 F. 2d 585 (2d Cir. 1983) 8, 9

United States v. Foley, 735 F. 2d 45 (2d Cir. 1984) 9

Contents

Page

United States Constitution Cited:

Sixth Amendment ..... i, 2

Fourteenth Amendment i

Fourteenth Amendment, Section 1 2

No. 84-1814

In The

Supreme Court of the United States

October Term, 1984

QUENTIN MEADOWS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

STATEMENT OF OPINIONS BELOW AND JURISDICTION

The petitioner has adequately set forth the opinions of the courts below, which are reproduced in the appendices of the petition.

The petitioner has also adequately stated the jurisdictional basis upon which he is seeking certiorari.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Section One of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Twice within eight days in October 1980, the petitioner robbed the same gas station in Nassau County, New York. On the first occasion, October 21, 1980, the petitioner robbed the station's

attendant, John Taylor, and his cousin, James Alviti, at gun point. The next day, the victims identified the petitioner as the robber from a photopack and from an array of sixteen slides.[1] Eight days later, on October 29, 1980, the petitioner returned to the gas station. At gun point, he robbed Taylor again and his fellow employee, Vincent Rizzuto.

Taylor called the police and, having recognized the petitioner from the first robbery, told them that the petitioner had robbed him a second time. Both Taylor and Rizzuto identified the petitioner from a photopack as the person who had just robbed them.

On November 7, 1980, the petitioner was arrested pursuant to a warrant and confessed to having committed both robberies. Subsequently, the petitioner was indicted. On May 19, 1981, a court-ordered lineup in which the petitioner participated was held. Rizzuto was the only one of the three victims present. He identified the petitioner as the man who had robbed him on October 29, 1980. Although the petitioner's attorney had been notified of the scheduled lineup, he did not attend.

The petitioner moved to suppress the identifications and his post-arrest statements. The hearing court found that neither photographic arrays (photopack and slides), nor the lineup was unduly suggestive. Furthermore, the court found that "each of the three victims had an independent source for in-court identifications, based on their observations during the robberies." *People v. Meadows,* 64 N.Y. 2d 956, 957 (1985) (10A-11A).[2] The

---

1. These facts except where noted, are paraphrased, or quoted, from the opinion of the New York Court of Appeals (64 N.Y. 2d 956), which is also set forth beginning at 9A of the petitioner's Appendix C.

2. The numbers in parentheses, followed by the letter "A," refer to those pages of the petitioner's Appendix C.

court reached the conclusion that the petitioner had not been denied his right to counsel at the lineup because of his attorney's refusal to be present. The court also found that the petitioner's statements could be used at trial to impeach his credibility.

At trial, Taylor, Alviti and a third witness to the first robbery testified. Taylor and Alviti identified the petitioner as the person who had robbed them; the third witness was not able to make an identification. In regard to the second robbery of October 29, 1980, Taylor and Rizzuto both testified and identified the petitioner as the robber. Rizzuto also testified to having identified the petitioner at the lineup.

The petitioner testified at trial that he had not committed the robberies. The prosecutor impeached the petitioner's testimony on cross-examination with his prior admissions. Also, on rebuttal, the prosecutor called the policeman, Detective Howell, who had taken the petitioner's statements. Detective Howell testified that the petitioner had admitted committing the robberies, thereby also impeaching the petitioner's testimony.

The petitioner raised these issues on appeal in the Supreme Court of the State of New York, Appellate Division, Second Department. That court unanimously affirmed the judgment of conviction without opinion. *People v. Meadows,* 102 A.D. 2d 1016 (2d Dept. 1984). The New York Court of Appeals granted the petitioner leave to appeal [62 N.Y.2d 988 (1984)], and on March 21, 1985, after considering the same issues which had been raised below and two of which are raised here, that court held that "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams,* 53 N.Y. 2d 241, 252)." *People v. Meadows,* 64 N.Y. 2d 956, 958 (1985) (12A). That court also found that the petitioner's statements were properly used for impeachment purposes. *Ibid.*

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

The petition sets forth two grounds: one involving a claim of a denial of a right to counsel, which purportedly rendered a lineup identification inadmissible, and the other concerning the allegedly improper use of a statement, obtained in violation of New York State's right to counsel law, solely for impeachment purposes. Neither issue presents a question of nationwide importance which would justify the granting of the petition. The first issue is *sui generis*; the second is actually predicated upon the rights of an individual as defined by a more restrictive state, not federal law. Thus, the use of the statements obtained in contravention of that law is not a matter of federal concern, and this petition should be denied.

A. The Admission of Testimony Concerning One Victim's Identification of the Petitioner at a Lineup Conducted in the Absence of Counsel Did Not Violate Any of the Petitioner's Constitutional Rights.

Subsequent to indictment, the trial court ordered a lineup to be conducted. The petitioner's counsel was notified of the date, but, despite this notification, and telephone calls which were placed to his office on the morning of the lineup, counsel was not present when the lineup was conducted later that day.

At trial, the single witness who viewed the lineup, Vincent Rizzuto, identified the petitioner as the person who robbed him on October 29, 1980. He also testified to having identified him at the lineup. His testimony, however, was not the only evidence connecting the petitioner with the commission of the crime. John Taylor, who was also robbed on that date, identified the petitioner

as the perpetrator. His testimony was crucial. Taylor also testified that it was the petitioner who had robbed him at the same location only eight days before, and that he recognized the petitioner at the time of the second robbery from the first crime. There was yet another eyewitness at trial. This third witness, James Alviti, had been present at the first robbery and testified that it had been the petitioner who had committed that crime.

Prior to trial, a suppression hearing had been held. The court found that Rizzuto, Taylor and Alviti all had sufficient independent bases for their in-court identifications of the petitioner. The petitioner failed to present any evidence at the hearing concerning why his attorney had absented himself from the lineup. The hearing court found that counsel had waived his presence at the lineup and ruled that to suppress Rizzuto's testimony concerning the lineup identification solely because of counsel's absence would, in effect, sanction an excessive abuse of the legal system, since counsel had a chronic record of non-attendance in court. Such a determination was not without precedent within New York State [see People v. Styles, 90 Misc. 2d 861 (S. Ct. N.Y. Cty. 1977), *aff'd*, 71 A.D. 2d 1066 (1st Dept. 1979)] or in other jurisdictions. *Cf., Jenkins v. State*, 167 Ga. App. 840, 308 S.E. 2d 14, 16 (1983) ("Counsel for defendant made a conscious decision not to attend lineup. He may not now complain.").

Policy reasons for sustaining this determination aside, as the New York Court of Appeals held, "[i]n the face of three in-court identifications by eyewitnesses, *the evidence of Rizzuto's lineup identification added little to the already overwhelming evidence of guilt.*" *People v. Meadows*, 64 N.Y. 2d 956, 958 (1985) (emphasis supplied). Therefore, the court continued, "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams*, 53 N.Y. 2d 241, 252)." *Ibid.* Clearly, then, that court resolved the issue by applying a harmless error analysis,

and, finding the petitioner's guilt to have been established by overwhelming evidence, perceived no reason to disturb either conviction.

Thus, resolution of the issue presented here depends upon evaluation of its own particular facts, which, in turn, limits its value as precedent. Even in New York, following this decision, cases in which an attorney is not present for a post-indictment, court-ordered lineup, and testimony concerning that lineup is later admitted at trial, will have to be decided on a case-by-case basis. The determination of whether there is legally sufficient evidence to sustain a conviction without that testimony can only be made individually. Since it has long been decided what the standards are against which such evidence is to be evaluated [*see Chapman v. California,* 386 U.S. 18 (1967)], this case presents no new question of law. Any decision by this Court on, what is, in actuality, only a tangential issue, *e.g.*, the admissibility of testimony concerning an identification from a lineup held in the absence of counsel, would have only a minimal impact on law nationwide. Therefore, this issue is not worthy of this Court's consideration.

B. The Petitioner's Statement, Although Obtained in Violation of His State Right to Counsel, was Admissible at Trial for Impeachment Purposes.

The petitioner was arrested pursuant to an arrest warrant, informed of his constitutional rights and, upon waiving them, gave a statement inculpating himself. This statement could not be used by the respondent on their direct case because at the time it was made, the petitioner's right to counsel had already attached under New York law, and he had not waived his right to counsel in the presence of counsel. *People v. Samuels,* 49 N.Y. 2d 218 (1980). After the petitioner had testified at trial and had denied having committed the robberies, however, the prosecutor

impeached the petitioner's testimony by using that statement both on cross-examination and on rebuttal under the authority of *Harris v. New York,* 401 U.S. 222 (1971) and *Oregon v. Hass,* 420 U.S. 714 (1975). This procedure was approved by the New York Court of Appeals. *People v. Meadows,* 64 N.Y.2d 956, 958 (1985) (12A).

Relying on the decision of the Court of Appeals for the Second Circuit in *United States v. Brown,* 699 F.2d 585 (2d Cir. 1983), the petitioner claims that under federal law a statement obtained in violation of the right to counsel cannot be used for impeachment purposes. However, *Brown* is inapposite because the issue posited by the petitioner involves a violation of New York law, specifically *Samuels,* which itself is based on New York statutory definitions. Because the right to counsel which has been transgressed is one peculiar to New York State (*compare with Kirby v. Illinois,* 406 U.S. 682 (1972)], even though there is superficial conflict between state and federal law, no federal right has been violated, and no issue of sufficient magnitude for this Court's consideration has been presented.

Moreover, there is no actual conflict between the laws of the two jurisidictions. The Second Circuit's holding in *Brown* was based upon this Court's ruling in *New Jersey v. Portash,* 440 U.S. 450 (1979), which involved the use of immunized grand jury testimony, "the essence of coerced testimony" (*id.* at 459), for impeachment purposes. It was the involuntary nature of Portash's statements (*see also, Mincey v. Arizona,* 437 U.S. 385 [1978]), rather than the violation of a constitutional right, as in *Harris v. New York,* 401 U.S. 222 (1971), which rendered their use as impeachment material impermissible. The petitioner's statements were not involuntary due to the exercise of coercion or the threat of contempt; they were merely unusable on the respondent's direct case because they were obtained in violation of the more restrictive New York State right to counsel which had attached simply because a felony complaint had already been filed. Thus, the precedent

advanced by the petitioner is distinguishable and does not require this Court to reconcile the two situations.

In any event, it does not appear that the Second Circuit will follow its decision in *Brown* under all circumstances. In *United States v. Foley,* 735 F. 2d 45, 49 (2d Cir. 1984), in *dictum,* that court noted that "a statement obtained in violation of the constitution can be used to impeach a defendant," and cited *Harris* as controlling authority as well as *Brown.* This Court had the opportunity to consider this question when Foley's co-defendant, John Elder, sought a writ of certiorari, but it denied his petition. *Elder v. United States,* ____ U.S. ____, 105 S. Ct. 915 (1985). Since the issue presented here involves a violation predicated solely on a state-created right and is not in conflict with any federal guarantees, this petition, too, should be denied.

CONCLUSION

The petition for a writ of certiorari must be denied.

Respectfully submitted,

DENIS DILLON
District Attorney
Nassau County
Attorney for Respondent

BRUCE E. WHITNEY
DENISE PARILLO
Assistant District Attorneys
Of Counsel